



Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

DIOUF NDIAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER
ON RECEIVABILITY

Counsel for Applicant:

Shubha Suresh Naik, OSLA

Counsel for Respondent:

Adrien Meubus, UNOG

Introduction

1. The Applicant is the widow of a former staff member who served with the Office for the Coordination of Humanitarian Affairs (“OCHA”) in Bamako, Mali. By an application filed on 8 March 2023, she contests the decision to deny her claim under Appendix D of the Staff Regulations and Rules of the United Nations (“Appendix D”) for compensation in respect of the death of her husband on 8 February 2017, which she claims was service-incurred. The decision was made by the United Nations Controller on behalf of the Secretary-General and was based on the recommendation of the Advisory Board on Compensation Claims (“ABCC”).

2. On 22 March 2023, the Respondent filed a motion requesting that, “in the interests of fairness and judicial economy, the Tribunal determines the receivability [of the application] as a preliminary matter pursuant to Articles 9 and 19 of the Tribunal’s Rules of Procedure”. The Respondent also requested the suspension of the deadline for filing his reply.

3. By email dated 28 March 2023, the Registry notified the parties that the Duty Judge had decided to suspend the deadline for the filing of the Respondent’s reply until the case was assigned to a Judge who would then consider the Respondent’s motion on receivability as a preliminary matter.

4. The case was assigned to the undersigned Judge on 31 August 2023.

5. Following the Tribunal’s Order No. 080 (NY/2023) dated 11 September 2023, the Applicant filed her response to the Respondent’s submissions on receivability on 13 October 2023.

6. Having examined the parties’ submissions on the receivability of the application, the Tribunal will now proceed to make a determination on the matter.

Facts

7. The Applicant’s spouse fell sick in late January 2017 and was admitted to a local clinic in his duty station, Bamako, Mali. His condition soon deteriorated and

he was medically evacuated to Paris, France where he passed away on 8 February 2017. The Applicant contends that her spouse's death was attributable to his service with the United Nations in the sense that he died because of the poor quality of the medical care he received in Bamako. She maintains that had he not been serving in Bamako, he would almost certainly have survived.

8. By letter dated 8 December 2022, the Compensation Claims Unit ("CCU") at the United Nations Office in Geneva ("UNOG") informed the Applicant that based on a medical determination made by the Division of Healthcare Management and Occupational Safety and Health ("DHMOSH"), the ABCC had recommended the rejection of her claim filed under Appendix D, and the United Nations Controller endorsed the recommendation.

9. On 10 January 2023, the Applicant requested a review of the medical determination under sec. 5.1 of Appendix D.

10. On 6 February 2023, she filed a management evaluation request, defining the decision to be evaluated as the "[d]ecision by the ABCC, reached on non-medical grounds...". On 9 February 2023, the Management Evaluation Unit rejected her request as non-receivable and on 8 March 2023, she filed the present application.

The parties' submissions

11. The Applicant contends in her application that her husband died as a result of "the inadequacy of the first line of treatment provided" to him in Bamako. She submits that the "ABCC failed to take into consideration the lack of seriousness" shown by United Nations medical personnel in Bamako regarding her husband's condition, which led to a delay in his medical evacuation. She further alleges that "there was mismanagement" in handling her husband's case leading to complications and that these factors "ought to be taken into consideration" in deciding her claim. She also disputes the ABCC's conclusion that her husband's co-morbidities contributed to his presentation and progression. Specifically, the Applicant requests the Tribunal to:

- a) remand the case back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the service-incurred death of her husband;
- b) award her damages relating to the delay in reaching a decision by the ABCC; and
- c) refer the matter to the Secretary-General for possible investigation and accountability.

12. In the motion filed on 22 March 2023, the Respondent challenges the receivability of the application on the grounds that, after the contested ABCC decision was issued on 8 December 2022, the Applicant had, on 10 January 2023, already submitted a request for a review of the medical determination under sec. 5.1 of Appendix D and that the review process remains pending. The Respondent argues that since there is not yet a final decision for the Tribunal to review, the application is “manifestly premature”. He asserts that internal remedies, including the review process available under sec. 5.1 of Appendix D, must be exhausted before there is an administrative decision capable of being reviewed. He adds that an administrative decision must produce direct legal consequences affecting the Applicant’s terms of appointment for that decision to be subject to review by the Tribunal.

13. In her response to the motion, the Applicant avers that there were “two separate decisions that were required to be made”. The first decision was a determination by the Controller, on behalf of the Secretary-General, to conduct a review of the ABCC’s recommendation following its review of the Applicant’s claim. The second one was a recommendation made by the ABCC after consideration of the report by the medical board and advice from DHMOSH. She explains that the present application concerns the first decision identified above, that the Controller “did not take a considered decision” and that the decision was made “without proper application of mind”. (Presumably, her 10 January 2023 request for review concerns the second decision mentioned above).

14. The Applicant also asserts in her response that DHMOSH and the ABCC failed to explore the quality of treatment her husband received at the first clinic he attended on the night of 26 January 2017. She contends that this “critical fact” is

“the matter at stake” and is what led to her husband’s death. She further asserts that the Controller “as the final decision maker should have noted this critical error and taken corrective actions to send the case back to ABCC for review”. In the Applicant’s view, the Controller’s decision is “not a determination by a technical body” and “not a medical determination but a decision taken after examination of all relevant facts”. The Applicant concludes that her husband’s death occurred due to the Organization’s failure to fulfil its duty of care. She also submits that due to the delay of nearly five years in deciding on her claim, during which time she suffered from stress, anxiety and financial hardship, she is entitled to compensation.

Considerations

Legal framework

15. The Tribunal notes that the present application is filed in accordance with art. 3.1(c) of the Statute of the Dispute Tribunal, which provides that:

1. An application under article 2, paragraph 1, of the present statute may be filed by:

[...]

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

16. The receivability of an application is a condition *sine qua non* for the Dispute Tribunal to exercise its power of judicial review (see, for instance, *Pellet* 2010-UNAT-073). Under the jurisprudence of the Appeals Tribunal, the Dispute Tribunal is required, *ex proprio motu*, to satisfy itself that an application is receivable under art. 8 of its Statute. The issue of receivability may be adjudicated even without serving the application on the Respondent for a reply, and even if the parties did not raise it. A determination on receivability must be made without regard to the merits of the case (see, for instance, the Appeals Tribunal in *Gehr* 2013-UNAT-313; *Christensen* 2013-UNAT-335; *Cooke* 2013-UNAT-380; *Lee* 2014-UNAT-481).

17. In the present case, the applicable legal framework is defined by Appendix D to the Staff Regulations and Rules of the United Nations (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) and the version in force at the time of the relevant events in this case was the Secretary-General's Bulletin ST/SGB/2017/1. It provides, in relevant parts, as follows:

Article 1.4

Advisory Board on Compensation Claims

(a) The Secretary-General has established the Advisory Board on Compensation Claims to consider claims for compensation arising from a service-incurred death, injury or illness and to make recommendations thereon to the Secretary-General.

[...]

Article 1.7

Role of the Medical Services Division

(a) The Medical Services Division shall make a medical determination for consideration by the Advisory Board on Compensation Claims or the official with delegated authority to consider de minimis claims. Such a determination may include:

(i) Whether a death, injury or illness is directly causatively related to an incident;

(ii) Whether a death, injury or illness is directly causatively related to the performance of official duties;

(iii) Whether treatment or services are directly related to a service-incurred injury or illness;

(iv) Whether treatment or services are reasonably necessary for the treatment of such an injury or illness; [...]

[...]

Article 2.2

Eligibility for coverage

(a) To be eligible to receive compensation under the present rules, the death, injury or illness underlying a claim must be

service-incurred, as assessed in accordance with article 2.2 (d) below.

(b) The Advisory Board on Compensation Claims will assess whether the death, injury or illness is service-incurred and provide its recommendation on a claim to the Secretary-General. For de minimis claims, the official with delegated authority to consider de minimis claims will assess whether the death, injury or illness is service-incurred and take a decision on the claim on behalf of the Secretary-General.

(c) Such an assessment will be based on the claimant's submissions, and, as appropriate, the recommendations of the Medical Services Division, technical advice from ex officio members of the Board and any other relevant documentary or other evidence.

Service-incurred death, injury or illness

(d) A death, injury or illness is service-incurred if it is directly attributable to the performance of official duties on behalf of the United Nations, in that it occurred while engaged in activities and at a place required for the performance of official duties.

[...]

18. Accordingly, concerning claims for compensation arising from a service-incurred death, injury or illness, the ABCC assesses the claim, with the assistance of the Medical Services Division which provides a medical opinion on the basis of its medical expertise, and makes its recommendation to the Secretary-General (see AAM 2023-UNAT-1372, para. 31).

19. The Tribunal further recalls that Appendix D also provides two different paths to challenge the Secretary-General's decision depending on different arguments raised by the claimant. It provides:

Article 5.1

Reconsideration of medical determinations

Claimants wishing to contest a decision taken on a claim under the present rules, when that decision is based upon a medical determination by the Medical Services Division or the United Nations Medical Director, shall submit a request for reconsideration of the medical determination under conditions, and by a technical body, established by the Secretary-General.

Article 5.2

Review and appeal of administrative decisions

Claimants wishing to contest a decision taken on a claim under the present rules, to the extent that the decision was based on considerations other than a medical determination, shall submit to the Secretary-General a written request for management evaluation in accordance with staff rule 11.2.

20. Under arts. 5.1 and 5.2, claimants are required to submit a request for reconsideration of the medical determination when the administrative decision is based upon such a determination; however, to the extent that the decision was based on considerations other than a medical determination, claimants shall submit a written request for management evaluation in accordance with staff rule 11.2 (see *AAM*, para. 33).

21. In the present case, the challenged decision, dated of 8 December 2022, and signed by an Administrative Officer at the CCU in UNOG, reads as follows (emphasis in the original):

On behalf of the workers' compensation body of the United Nations, the Advisory Board on Compensation Claims (the "Board") and the Controller/Assistant-Secretary-General [...], I regret to inform you that your claim under the Appendix D to the United Nations Staff Rules, for the death of your husband has been denied.

The case was presented to the Board at its 529th meeting on 04 November 2022. The Board's recommendation to deny your claim was subsequently endorsed by the Controller on behalf of the Secretary-General.

The Division of Healthcare Management and Occupational Safety and Health (DHMOSH) reviewed the circumstances of [the deceased staff member's] death and found that "*the care provided had limited impact on his overall prognosis. He had significant risk factors (lipids, high blood pressure and long-standing diabetes) and these all were significant contributors to his presentation and progression. [The deceased staff member] developed a large but silent heart attack in the first day that then led to the formation of a large clot in his heart that is largely untreatable. This was the cause of his stroke that did not occur until late on the 28th, and which was diagnosed clinically and radiologically almost immediately - there was no delay of note, and unfortunately this was largely untreatable.*

Even in Paris the loss of heart muscle and the clot were so significant that they were not able to be effectively managed, leading to [the deceased staff member's] passing. [DHMOSH] did not see any aspect of the treatment that should have been different and would have routinely prevented deterioration. Unfortunately, this is not considered to be directly related to service as the cause of death is due to his condition, not the treatment provided."

The Board, having considered all the facts presented and available documentation, determined that it could not be established that [the deceased staff member's] death was due to inadequate care he received at [the local clinic in Bamako] and therefore recommended to deny the claim.

On the request to remand the case back to the ABCC

22. The Respondent submits that the application is not receivable because, "as averred by the Applicant" in her application, on 10 January 2022, she had already requested a review of the medical determination under section 5.1 of Appendix D and that review process remains pending at this time. Accordingly, the application is "manifestly premature" as there is not yet a final administrative decision for the Tribunal to review.

23. Relying on the Appeals Tribunal's judgment in *AAM* (cited earlier), which also considered an Appendix D claim, the Applicant attempts to distinguish between an administrative decision made by the Controller (on behalf of the Secretary-General), on the one hand; and a recommendation made by the ABCC based on medical advice from DHMOSH, on the other hand. She submits that the contested decision in this case is the decision of the Secretary-General not to grant her benefits under Appendix D. In that connection, she argues that the Controller, as the delegated authority, is "not merely a rubber stamp who without application of mind endorses the recommendations of the ABCC". In her view, the Controller ignored relevant matters and "did not take a considered decision" when he decided on her claim. For instance, she asserts that her husband's death occurred due to the failure of the duty of care on the part of the Organization in Bamako, but the Controller failed to take that factor into consideration in deciding on the Appendix D claim.

24. As stated above, under art. 5.1 of Appendix D, claimants wishing to contest a decision taken on a claim, when that decision is based upon a medical determination by the Medical Services Division or the United Nations Medical Director, shall submit a request for reconsideration of the medical determination under conditions, and by a technical body, established by the Secretary-General. Meanwhile, disagreements about administrative decisions based on medical determinations are governed by ST/AI/2019/1, the Administrative Instruction on Resolution of disputes relating to medical determinations.

25. The Tribunal notes that although there are some similarities between the present case and the *AAM* case relied upon by the Applicant, there are also many significant differences. For example, in the present case, regarding the Applicant's first request, she only asks that the case be remanded back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the service-incurred death of her husband. The wording of her request suggests that she is aware that the decision of the Controller was only based on the recommendation of the ABCC, and not on any other consideration than a medical determination.

26. Moreover, regarding the judicial review of the medical assessment provided by DHMOSH, the Appeals Tribunal has held that the Dispute Tribunal does not have the competence to decide that the "medical advice rendered by it to the ABCC was incorrect" and thereby question the sufficiency and relevance of a given medical assessment to a certain claim (see *Applicant* 2021-UNAT-1133). The Appeals Tribunal has also affirmed that "this jurisprudence provides philosophies, principles and a methodology for the Tribunal in dealing with relevant cases" (see *AAM*, para. 51). In any event, the Tribunal notes that by virtue of the request made by the Applicant on 10 January 2023 under art. 5.1 of Appendix D, the case has already been "remanded back to the ABCC to make a new determination for compensation under Appendix D" for the alleged service-incurred death of the Applicant's husband. Therefore, considering the exact wording of this specific request, the Tribunal finds that it is moot.

27. Even if this request by the Applicant were to be interpreted as seeking the rescission of the Controller's decision, the Tribunal finds that the argument that the

Applicant relies upon is not persuasive. According to the Applicant, “[t]his decision of the Controller is not a medical determination, but a decision taken after examination of all relevant facts”. She submits that her husband’s death occurred after he sought care at the United Nations Level 1 clinic in Bamako, which was closed at the time, and he then went to the United Nations Level 2 hospital, where the staff refused to see him because he did not have a referral from the Level 1 clinic. This is how her husband ended up following the recommendation of a United Nations doctor and going to an external United Nations-recommended clinic where he was misdiagnosed, delaying better-quality care by around 12 hours, with fatal consequences.

28. This argument must fail because it does not show that the Controller’s decision was “not a medical determination”. On the contrary, the DHMOSH analysis, on which the Controller based his decision, clearly sets out that “*there was no delay of note*” in treating the Applicant’s husband at his duty station, and that his condition “*was largely untreatable*”. It also states that “[DHMOSH] *did not see any aspect of the treatment that should have been different and would have routinely prevented deterioration*”. That is why the contested decision concluded that “*this is not considered to be directly related to service as the cause of death is due to his condition, not the treatment provided*”.

29. Therefore, the Tribunal finds that the contested decision is based solely on a medical determination that was made under Appendix D. Accordingly, the request that the case be remanded back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the alleged service-incurred death of the Applicant’s husband is not receivable.

On the request for the award of damages relating to the delay

30. The Applicant submits that the Organization failed in its duty to respond in a prompt and timely fashion to her claim for compensation and that it failed to adhere to “the highest standards of care and due diligence”. She points out that her claim was first filed on 2 February 2018, and that despite “several communications and after the submission of detailed documentation” related to the case, the

ABCC's recommendation and the Controller's decision "finally came in December 2022, close to 5 years from the initial submission". She further submits that during this period, she suffered from anxiety, financial problems, stress "and overall immense frustration over the lack of answers" about the claim.

31. In his motion on receivability, the Respondent does not challenge the receivability of the Applicant's second request related to the award of damages for the delay in reaching a decision by the ABCC. In fact, the Respondent does not directly address the issue of delay or the request for damages, but only states that all other claims contained in the application, except for the medical determination under Appendix D, are "ancillary".

32. The Tribunal does not consider the Applicant's request for the award of damages resulting from the delay as ancillary to the medical determination. By making this request, the Applicant does not challenge the substance of the Controller's decision or of the ABCC's recommendation. Instead, the focus is on the amount of time it took to reach the decision. As the Appeals Tribunal has stated, it is possible to grant a claimant compensation for delay even if the underlying decision is lawful (see *AAM*, paras. 61 and 62). Accordingly, the Tribunal finds that this request for the award of damages is receivable.

On the request to refer the matter for possible investigation and accountability

33. Pursuant to art. 10.8 of its Statute, the Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability. The Tribunal therefore finds that this request is receivable and will make a determination regarding a possible referral at the appropriate time.

34. In light of the above,

IT IS ORDERED THAT:

35. The request to remand the case back to the ABCC to make a new determination on the eligibility for compensation under Appendix D for the alleged

service-incurred death of the Applicant's husband is dismissed as not receivable *ratione materiae*;

36. The request for the award of damages relating to the delay in reaching a decision by the ABCC is receivable; and

37. The request to refer the matter to the Secretary-General for possible investigation and accountability is receivable.

38. By **3:00 p.m. on Friday, 1 March 2024**, the Respondent is to file his reply on the merits, which is to be eight pages maximum, using font Times New Roman, font size 12 and 1.5 line spacing, specifically regarding the Applicant's request for the award of damages relating to the delay in making a recommendation by the ABCC and in reaching a decision by the Controller.

39. Upon receipt of the above-referred submission, the Tribunal will issue the relevant instructions for further case management.

(Signed)

Judge Joelle Adda

Dated this 15th day of February 2024

Entered in the Register on this 15th day of February 2024

(Signed)

Isaac Endeley, Registrar, New York